

COURT OF APPEALS
DIVISION TWO

¶1 In this appeal from the trial court's denial of his motion to vacate his sentences, which we treat as a petition for review of the denial of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., petitioner Lacy Riddell, Jr. contends the aggravated prison terms he received in August 1986 were unlawfully imposed in CR-17839 and CR-17878, the sentences are contrary to former A.R.S. § 13-604(G), they violate due process under the state and federal constitutions, and, consequently, the terms in actuality have been served in their entirety. We review a trial court's order denying relief for an abuse

of discretion. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). An abuse of discretion includes erroneously ruling on a question of law. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006).

¶2 Riddell invaded the home of a ninety-seven-year-old woman and sexually assaulted her, giving rise to the charges in CR-17839. A jury found him guilty of aggravated assault, robbery, kidnapping, and sexual assault, all dangerous nature offenses. The jury also found Riddell guilty of one nondangerous offense, second-degree burglary. Riddell was sentenced to concurrent, aggravated prison terms of twenty, twelve, twenty-eight, and twenty-eight years, respectively, for counts one, three, four, and five, enhanced terms based on Riddell's two nondangerous, prior felony convictions. He was sentenced to a similarly enhanced, aggravated prison term of twenty years on the burglary conviction, to be served consecutively to the other prison terms.

¶3 After a separate jury trial in CR-17878, Riddell was convicted of second-degree burglary and theft by control, nondangerous offenses; his aggravated sentences were enhanced by two prior nondangerous felony convictions. These terms of twenty and six years were to be served concurrently but consecutively to the terms in CR-17839. The convictions and sentences were affirmed on appeal, this court rejecting, inter alia, Riddell's challenge to the aggravated prison terms. *State v. Riddell*, Nos. 2 CA-CR 4658-3, 2 CA-CR 4695-4 (consolidated) (memorandum decision filed July 14, 1987). And this court has denied relief on three petitions for review challenging the denial of post-conviction relief, filed before the motion that gave rise to this petition for review. *State v. Riddell*, No. 2 CA-CR 2005-0244-PR (memorandum decision filed Mar. 16, 2006); *State*

v. Riddell, No. 2 CA-CR 2003-0067-PR (decision order filed Sept. 10, 2004); *State v. Riddell*, No. 2 CA-CR 2001-0087-PR (memorandum decision filed Nov. 30, 2001).

¶4 In August 2006, Riddell filed a motion to vacate his sentences. In its opposition to the motion, the state maintained Riddell had previously filed six petitions for post-conviction relief challenging the sentences. The state asserted the claims were precluded; the trial court agreed and denied the motion.

¶5 Regardless of how Riddell characterizes his claims, they are cognizable only as post-conviction claims pursuant to Rule 32. As such, they are subject to Rule 32.2, which precludes claims raised and adjudicated in prior proceedings or claims that have been waived by a defendant's failure to raise them on appeal or in a previous collateral proceeding. Several of the claims, specifically the contention that the sentencing judge failed to articulate aggravating circumstances, appear to reiterate claims Riddell raised on appeal and criticism of this court's resolution of the issues previously raised by Riddell on appeal. As such, they are precluded. And to the extent Riddell presents claims for the first time in the petition for review, they are not properly before us. Other claims could have been raised on appeal or in previous post-conviction proceedings but were not. And nothing in the petition for review establishes that Rule 32.2 is inapplicable or that Riddell should be excused from its preclusive effect.

¶6 In that regard, Riddell asserts his first Rule 32 counsel was ineffective in "fail[ing] to check to make sure that his client had receive[d] a lawful sentence." This, he argues, is a claim of sufficient constitutional magnitude to be addressed, as contemplated by *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). Though he concedes he "repeatedly

raised the ground of ineffective assistance of Rule 32 counsel,” he insists that because the sentences are unlawful, the claims are not precluded.¹ We disagree.

¶7 In general, when “ineffective assistance of counsel claims are raised, or could have been raised, *in a Rule 32 post-conviction relief proceeding*, subsequent claims of ineffective assistance will be deemed waived and precluded.” *State v. Spreitz*, 202 Ariz. 1, ¶ 4, 39 P.3d 525, 526 (2002). In *Smith*, our supreme court stated that, with respect to claims of ineffective assistance of counsel not previously raised, whether the claims are precluded depends on the nature, rather than the merits, of the underlying claim or claims. 202 Ariz. 446, ¶ 12, 46 P.3d at 1071. There, the court specified the kinds of claims that may be precluded under Rule 32.2 based on a defendant’s mere failure to raise them previously and claims that require a personal waiver before they may be deemed waived and, therefore, precluded. 202 Ariz. 446, ¶ 9, 46 P.3d at 1070. As the supreme court pointed out, the comment to the rule acknowledges that claims of “significant constitutional magnitude” must be knowingly, voluntarily, and intelligently waived before they may be deemed precluded pursuant to Rule 32.2(a)(3). 202 Ariz. 446, ¶ 9, 46 P.3d at 1070. The court stated:

The question whether an asserted ground is of “sufficient constitutional magnitude” to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), *see* Comment to Rule 32.2(a)(3), does not depend upon the merits of the particular ground. It depends merely upon the particular right alleged to have been violated.

202 Ariz. 446, ¶10, 46 P.3d at 1071.

¹Riddell did not raise the claim of ineffective assistance of Rule 32 counsel until his reply to the state’s opposition to his motion to vacate his sentences. Nevertheless, we address the claim on review.

¶8 None of Riddell’s claims may be characterized as claims of “significant constitutional magnitude.” Ariz. R. Crim. P. 32.2 cmt. Riddell has not established the sentences are unlawful. Consequently, his claims, even when raised as a claim of ineffective assistance of counsel, are waived.

¶9 We note, moreover, that Riddell erroneously characterizes himself as an “of-right” petitioner, arguing he may challenge the performance of appointed Rule 32 counsel. *See* Ariz. R. Crim. P. 32.1. But as a nonpleading defendant, Riddell was not an “of-right” petitioner as contemplated by Rule 32.1. Consequently, Riddell was not entitled to challenge that attorney’s performance in subsequent, successive Rule 32 proceedings. *See State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996).

¶10 Although we grant the petition for review, because Riddell has not established the trial court abused its discretion, we deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge